

Appendix M3. Programmatic Agreement

**PROGRAMMATIC AGREEMENT
AMONG THE U.S. ARMY CORPS OF ENGINEERS,
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD,
CALIFORNIA STATE HISTORIC PRESERVATION OFFICER,
ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
DELTA WETLANDS PROPERTIES REGARDING THE
IMPLEMENTATION OF THE DELTA WETLANDS PROJECT**

(Draft - October 20, 1994)

WHEREAS, the U.S. Army Corps of Engineers (Corps) has determined that the issuance of a permit to construct the Delta Wetlands project (DW project) will affect historic properties included in or eligible for inclusion in the National Register of Historic Places (NRHP), and has consulted the California State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) pursuant to Section 106 of the National Historic Preservation Act (16 USC 470f) and its implementing regulations; and

WHEREAS, the project involves reconstruction of levees and the inundation of Bacon Island and Webb Tract and the reconstruction of levees and development of wildlife habitat on Bouldin Island and Holland Tract, the project is to be constructed on nonfederal land and does not involve federal funds, but does require a Corps permit pursuant to Section 404 of the Clean Water Act. The project may affect historic properties through the construction of project components and the operation of the project; and

WHEREAS, the area of potential effect (APE) for this undertaking includes lands subject to the effects from project construction and operation, delineated in Attachment 1; and

WHEREAS, the Corps is the lead agency for purposes of compliance with Section 106 of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA); and

WHEREAS, the California State Water Resources Control Board (SWRCB) is the lead agency for purposes of compliance with the California Environmental Quality Act (CEQA); and

WHEREAS, the project proponent, Delta Wetlands Properties (DW), has been consulted and invited to concur in this programmatic agreement (PA);

NOW, THEREFORE, the Corps, SWRCB, DW, the SHPO, and Council agree that the DW project will be administered in accordance with the following stipulations to satisfy the Corps' Section 106 responsibilities for all individual aspects of the project.

STIPULATIONS

The Corps shall ensure that the following measures are carried out:

I. PRINCIPLES

- A. All known cultural resources within the APE will be evaluated by applying the NRHP criteria for evaluation, as described in 36 CFR 60.4. The APE is described in Attachment 1.
- B. The consideration of effects of the proposed undertaking on historic properties shall be guided by a historic properties management plan (HPMP). No project-related land-disturbing or resource-disturbing activities, as defined in Section III of this agreement, will occur until an HPMP is developed and approved by the signatories to this PA and implemented by DW.
- C. The HPMP will describe management measures for all cultural resources within the APE. These measures may include:
 - procedures for classifying cultural resources to determine their values and appropriate management measures;
 - public education and interpretation of historic resources through the development of media presentations, such as brochures and videotapes;
 - measures to protect important archaeological properties from project-related effects;
 - long-term monitoring of protective measures to determine their effectiveness; and
 - data recovery at archaeological sites considered important for their scientific information potential that cannot be protected or for which protective measures prove ineffective.
- D. If project-related impacts, as described in Sections II and III of this agreement, on previously unidentified cultural resources are discovered during project construction or operation, it will not be necessary to prepare determination of eligibility reports. In these instances, DW shall collect sufficient information to determine the appropriate treatment for those resources, in consultation with the Corps, SWRCB, the SHPO, and the ACHP.
- E. The development and implementation of management measures for prehistoric and Native American archaeological sites will consider the views and values placed on these properties by contemporary Native Americans.

II. DEFINITIONS

"APEs" are defined as geographic areas within which an undertaking may cause changes in the character or use of historic properties.

"Corps" is the federal agency responsible for issuing a Department of the Army permit for the construction of the DW project pursuant to Section 404 of the Clean Water Act and is the lead agency for purposes of compliance with NEPA and Section 106 of the NHPA.

"Cultural properties" means known and previously undiscovered properties within the APE that might have historical, archaeological, or cultural value, and thus have potential for inclusion in the NRHP, but which have not been evaluated with reference to NRHP criteria (36 CFR 60.4).

"Delta Wetlands project" is defined in the Corps and SWRCB joint draft environmental impact report/environmental impact statement (EIR/EIS) (1994) and involves improving existing levees on and inundating Bacon Island and Webb Tract, and reconstructing levees and developing wildlife habitat on Bouldin Island and Holland Tract.

"Evaluation" means the process of applying the NRHP criteria (36 CFR 60.4) to a property, including activities conducted to collect information by which to apply these criteria.

"Historic properties" means properties that are listed in or are eligible for listing in the NRHP. Historic properties can be eligible for listing in the NRHP individually and as contributing elements to an NRHP-eligible district.

"Identification" means locating and classifying cultural properties.

"Impacts" are defined as changes in the character or setting of cultural properties that may contribute to NRHP eligibility. DW project impacts include demolition of structures, grading, drilling, and other ground-disturbing activities; improvement of levees or other earthwork; and inundation of the islands. Inundation will result in resources being subjected to the effects of wet and dry cycling and wave erosion.

"Monitoring" is defined as periodic site visits by a qualified archaeologist to known sites and the locations of possibly buried sites to determine whether the construction or operation of the project has resulted in the unanticipated discovery of cultural resources.

"SWRCB" is the lead agency for purposes of compliance with CEQA.

"Traditional cultural properties" are properties that derive their significance from the role the properties play in the cultural practices or beliefs of an extant community or identifiable social group.

"Treatment" means the management of historic properties in accordance with Sections 106 and 110 of the NHPA.

III. PROTECTION OF SITES BEFORE DEVELOPMENT OF THE HISTORIC PROPERTIES MANAGEMENT PLAN

No project-related land-disturbing or resource-disturbing activities will occur until the HPMP is developed and approved by the consulting parties to this PA and implemented by DW. Project-related activities that could cause impacts on cultural resources include, but are not limited to, demolition of structures; grading, drilling, and other ground-disturbing activities; levee improvements or other earthwork; and inundation of the islands.

IV. INVENTORY OF HISTORIC PROPERTIES

- A. The Corps will consult with the SHPO to review historic property identification studies already conducted in the DW project's APE.
 1. DW will take the necessary actions to complete the historic property inventory of the APE in a manner consistent with the Secretary of the Interior's *Standards and Guidelines for Identification* (48 FR 44720-23), the National Park Service publication *The Archaeological Survey: Methods and Uses* (1978: GPO Stock No. 024-016-00091), and guidance offered by the SHPO.
 2. DW will record archaeological properties on California Department of Parks and Recreation (DPR) Form 422 in accordance with the Office of Historic Preservation's (OHP's) guidelines *California Archaeological Handbook for Completing an Archaeological Site Record* (March 1989), and submit those forms for permanent site numbers to the appropriate Information Center of the California Archaeological Inventory prior to the submission of inventory reports for review.
 3. DW will record historic resources on DPR Form 523 in accordance with the OHP's *Instructions for Completing California Historic Resources Inventory Forms* (March 1984).
 4. DW will prepare and distribute reports on the results of inventory efforts in accordance with Stipulation X.

- B. The Corps will ensure that inventory reports are circulated for review in accordance with the provisions contained in Stipulations IX and X.

V. HISTORIC PROPERTY EVALUATION

- A. DW will apply the NRHP criteria for evaluation, as described in 36 CFR 60.4, to all known cultural resources within the APE, taking into account the Secretary of the Interior's *Standards and Guidelines for Evaluation* (48 FR 190:44729-38) and *National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation* (1991) and guidance found in *Treatment of Archaeological Properties: A Handbook* (Advisory Council on Historic Preservation 1980).
1. DW will conduct appropriate professional studies to collect sufficient information by which to apply the NRHP criteria.
 2. All evaluations will follow an evaluation research design. Research design outline and content will be consistent with that found in *Guidelines for Archaeological Research Designs* (Office of Historic Preservation 1991) and other guidance offered by the SHPO.
 3. DW will prepare draft and final report(s) on the results of the evaluation studies and submit the draft report(s) for review and comment. Final reports will incorporate the comments on draft documents. Content and scope of evaluation report(s) will follow state guidelines found in *Archaeological Resource Management Reports (ARMR): Recommended Contents and Format* (Office of Historic Preservation 1989).
 4. Once evaluative studies have been initiated, DW will fully analyze and document the materials and data resulting from the studies according to the evaluation research design. Changes in the DW project will not relieve DW of the responsibility of completing resource evaluations once data have been collected or cultural materials have been removed from an archaeological site.
- B. The Corps will consult with the SHPO in applying the NRHP criteria for evaluation described in 36 CFR 60.4 for all known cultural properties in the DW project's APE, as described in Attachment 1.
- C. No further consideration need be given properties determined by the Corps and the SWRCB, in consultation with the SHPO, to be ineligible for inclusion in the NRHP.
- D. If evaluation results in the identification of a property or properties that the Corps, SWRCB, and the SHPO agree are eligible for inclusion in the NRHP, those properties will be included in, and treated according to, the HPMP.

- E. If project-related impacts, as described in Sections II and III of this agreement, on previously unidentified cultural resources are discovered during project construction or operation, preparing determination of eligibility reports will not be necessary. In these instances, DW shall collect sufficient information to determine the appropriate treatment of those resources in consultation with the Corps, SWRCB, the SHPO, and the ACHP. The steps necessary to determine the appropriate treatment for unanticipated discoveries will be outlined in the HPMP and the monitoring plan.

VI. HISTORIC PROPERTIES MANAGEMENT PLAN

DW will prepare an HPMP acceptable to the Corps, SWRCB, the SHPO, and the ACHP. The HPMP shall guide the consideration and treatment of historic properties within the APE. At a minimum, the HPMP shall include the topics outlined in Attachment 2. A monitoring plan will be prepared that outlines the requirements for monitoring and the procedures to follow in the event of unanticipated discoveries. The monitoring plan will require preparation of a periodic monitoring report. Where necessary, a data recovery plan (DRP) will be prepared. At a minimum, DRPs will include the topics outlined in Attachment 3. These documents will take into account the national policies set forth in Section 2 of the NHPA and the Secretary of the Interior's *Standards and Guidelines for Documentation* (48 FR 44729-38).

VII. CHANGES IN THE UNDERTAKING OR AREA OF POTENTIAL EFFECT

- A. If, during project planning or implementation, modifications in the undertaking or the APE are proposed or there are proposed activities in ancillary areas that have not been previously inventoried for historic properties, the Corps shall ensure that the revised APE is inventoried and that cultural properties are evaluated by DW in a manner consistent with the inventory, evaluation, and standards identified in this agreement before the occurrence of any project-related activities, as described in Section III of this agreement. DW will prepare a draft report(s) of the inventory results and submit it (them) to the Corps, SWRCB, and the SHPO for review and comment. A final report incorporating the comments of the Corps, SWRCB, and the SHPO will be prepared. Final reports will be provided to the Corps, SWRCB, the SHPO, and the ACHP.
- B. The HPMP shall be modified or appended, as appropriate, to incorporate treatment and management measures for historic and unevaluated properties in the revised APE consistent with this agreement.
- C. SWRCB, the SHPO, and interested parties shall be afforded an opportunity to comment on documents prepared in response to a revised undertaking or APE. The Corps shall assume concurrence of all parties that fail to comment within the 30-day review period after receipt of documentation. If any party to this

agreement objects to any element of the documentation within the review period, objection shall be resolved in accordance with Section XII of this agreement.

VIII. PARTICIPATION OF INTERESTED PARTIES

Interested members of the public will be given opportunities to comment on implementation of this agreement by its inclusion in the draft EIR/EIS. The views of Most Likely Descendants (MLDs), as identified through consultation with the California Native American Heritage Commission (NAHC), and other interested Native Americans and appropriate ethnic groups will also be solicited. To every reasonable and feasible extent, the views of ethnic groups will be considered and integrated into planning and conducting any work involving the disturbance of historic properties associated with these groups.

IX. REVIEW, CONSULTATION, AND COORDINATION

The following review and consultation procedures shall be followed:

- A. The Corps and SWRCB shall review and comment on the reports on the evaluation and treatment of historic properties in the APE.
- B. The Corps shall afford the SHPO the opportunity to review and comment on the draft and final reports on the evaluation of historic properties within the APE. If the SHPO does not respond within 30 days after receipt, the Corps shall assume that the SHPO concurs with the Corps' determinations regarding the eligibility of historic properties. The review period may be extended for due cause, at the discretion of the Corps, upon request and substantiation by the SHPO.
- C. DW shall afford the Corps, SWRCB, the SHPO, and the ACHP the opportunity to participate in the development and review of the draft HPMP. DW will afford interested parties, including appropriate Native American groups and individuals identified in the HPMP, an opportunity to review the draft HPMP (including ancillary treatment plans or DRPs). The general contents of the HPMP are outlined in Attachment 2, and the contents of the DRPs are included in Attachment 3.

If the Corps, SWRCB, the SHPO, the ACHP, or interested parties do not respond within 30 days after the request, DW shall assume that they do not object to the draft HPMP.

- D. Absent objection from SWRCB, the SHPO, the ACHP, or interested parties, the Corps shall ensure that DW implements the final HPMP and/or treatment plans.

If any party to this agreement objects to the HPMP within 30 days, the objection will be resolved in accordance with Section XII of this agreement.

- E. DW shall ensure that all the draft and final reports that result from implementation of the final HPMP and/or treatment plans are provided to the Corps, SWRCB, the SHPO, and interested parties. Final reports will also be provided to the ACHP.
- F. Where the Corps, SWRCB, the SHPO, or the ACHP determine that the effects of the undertaking warrant such action, the Corps will consult further with the parties to this agreement to seek agreement on ways to treat the effect before making a decision regarding the undertaking, and shall implement any agreement reached. If agreement is not reached, procedures outlined in Stipulation XII of this agreement will be followed.
- G. Review of periodic monitoring reports as required by the HPMP will be the responsibility of SWRCB.

X. REPORT FORMAT AND PROFESSIONAL REQUIREMENTS

DW shall ensure that all documents prepared to satisfy the terms of this agreement are responsive to contemporary professional standards, the Secretary of the Interior's *Format Standards for Final Reports of Data Recovery Programs* (42 FR 5377-79), and the SHPO's *Archaeological Resource Management Reports (ARMR): Recommended Contents and Format* (1989). Archaeological sites shall be referred to by their permanent trinomial designations in all final reports.

DW will ensure that the final report, excluding precise locational data, is made available to the professional community and the public. Plans for report distribution shall be presented in the HPMP.

- A. Reports shall be organized with appendices that exclude precise locational data. Scale maps that do not disclose the specific location of archaeological sites may be incorporated into the body of the final report.
- B. DW shall submit the final report, including appendices with locational information, to the parties named in Stipulation IX.

All studies conducted under the terms of this agreement will be carried out or directly supervised by appropriately trained persons who meet the Secretary of the Interior's professional qualification standards for the particular field of study in which they are working. DW will retain staff or consultants meeting the aforementioned standards for the purposes of monitoring and implementing the terms of this agreement.

XI. CURATION AND THE DISPOSITION OF CULTURAL AND HUMAN REMAINS

- A. The Corps shall ensure that curation of records and other items resulting from identification and data recovery efforts proceed with the intent of meeting 36 CFR Part 79, the Archaeological Resources Protection Act, and the Antiquities Act of 1906. Materials collected shall be maintained by DW in accordance with 36 CFR 79 until any specified analysis is completed. DW will consult with the Corps, SWRCB, and MLDs and other Native American groups and ethnic communities regarding the permanent curation of archaeological materials.
- B. DW shall ensure that any human remains encountered during the course of this undertaking are treated in a respectful manner. If human remains are encountered, the Corps, SWRCB, and DW shall consult with the NAHC and the MLDs to determine treatment and disposition measures consistent with the provisions of Sections 7050.5 and 5097.98 of the California Health and Safety Code.

XII. DISPUTE RESOLUTION

Should SWRCB, the SHPO, or the ACHP object within 30 days of receipt of a revised APE description, a draft HPMP, DRPs, a Curation Plan, or draft final reports, the Corps shall consult with the objecting party to resolve the objection. If the Corps determines that the objection cannot be resolved, the Corps shall forward all documentation relevant to the dispute to the ACHP. Within 30 days after receipt of all pertinent documentation, the ACHP shall either:

- provide the Corps with recommendations that the Corps shall take into account in reaching a final decision regarding the dispute or
- notify the Corps that it will comment within an additional 30 days.

Any Council comment provided in response to such a request will be taken into account by the Corps, with reference to the subject of the dispute.

Any recommendation or comment provided by the ACHP will be understood to pertain only to the subject of the dispute; the Corps' responsibility to carry out all actions under this agreement that are not the subject of the dispute will remain unchanged.

XIII. AMENDMENT

Any party to this agreement may request that it be amended, whereupon the parties to this agreement will consult to consider such amendment.

XIV. TERMINATION

Any party to this agreement may terminate it by providing 30 days' written notice to the other parties, provided that the parties consult during the period before the proposed termination to seek agreement on amendments or other actions that would avoid termination. The ACHP will be afforded an opportunity to comment during this period as well. In the event of termination, the Corps will comply with Stipulations IV and V of this agreement.

XV. FAILURE TO CARRY OUT THE TERMS OF THE AGREEMENT

In the event that the terms of this agreement are not carried out, the Corps shall comply with Stipulations IV and V of this agreement with regard to individual actions covered by this agreement.

XVI. SCOPE OF AGREEMENT

Execution of this agreement and implementation of its terms evidence that the Corps has satisfied its Section 106 responsibilities for all individual undertakings of the program.

XVII. SCHEDULE

The draft PA will be included in the draft EIR/EIS for the project. Implementation of the HPMP and the preparation of data recovery plans will follow completion of the final EIR/EIS. The HPMP will include a schedule for implementation.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____
Robert D. Bush, Executive Director

Date: _____

U.S. ARMY CORPS OF ENGINEERS

By: _____
John N. Reese, Colonel
Corps of Engineers, District Engineer

Date: _____

CALIFORNIA STATE HISTORIC PRESERVATION OFFICER

By: _____
Cherilyn Widell, SHPO

Date: _____

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

By: _____
Walt Pettit, Executive Director

Date: _____

Concur:

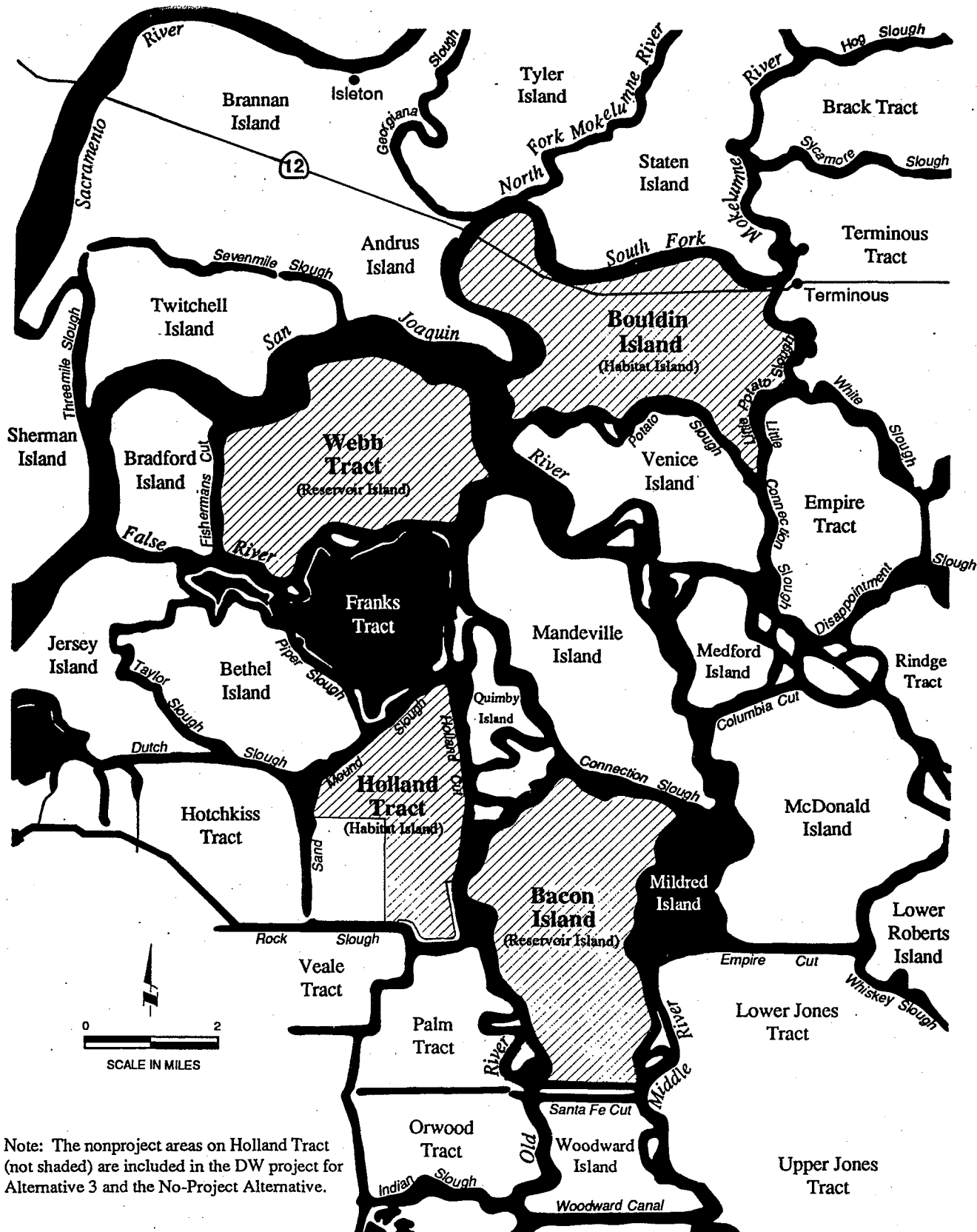
**DELTA WETLANDS PROPERTIES,
an Illinois general partnership**

By: Delta Wetlands,
a California corporation

By: _____
John Winther, President

Date: _____

Attachment 1. DW Project Islands



Note: The nonproject areas on Holland Tract (not shaded) are included in the DW project for Alternative 3 and the No-Project Alternative.

Source: Adapted from California Department of Water Resources 1993.

DW Project Islands

DELTA WETLANDS PROJECT EIR/EIS

Prepared by: Jones & Stokes Associates

**Attachment 2. Historic Properties Management Plan
(Draft Outline)**

Attachment 2. Historic Properties Management Plan (Draft Outline)

- A. **Project Status.** The nature of the undertaking, the status and results of the cultural resources inventory, and evaluation work conducted to date shall be discussed in the HPMP.
- B. **Associated Values.** The HPMP will address the evaluation of unidentified properties discovered during project implementation with reference to 36 CFR 60.4.
- C. **Effects.** The anticipated effects of the undertaking on unidentified historic properties discovered during project implementation shall be discussed. The Corps shall determine what effect the undertaking may have on historical properties by applying the Criteria of Effect and Adverse Effect as defined by Section 106 and its implementing regulations. In making this determination, the Corps shall consult with the SHPO, SWRCB, concerned Native American tribes, and other groups, as needed.
- D. **Management Strategies and Treatment Options.** The HPMP will discuss management strategies to protect and consider historic and unidentified properties. The HPMP will call for the preparation of a monitoring plan that outlines the monitoring requirements and the procedures to be followed for unanticipated discoveries. If protective measures prove ineffective, the HPMP will describe procedures by which effects on these properties will be treated. The HPMP shall discuss a range of treatment measures that can be applied to historic and unidentified properties in the APE. These measures include, but are not limited to, the following treatment options:
- preserving a property in place based on project modification or redesign;
 - conducting adaptive reuse of a property;
 - incorporating a property into the design of the undertaking in a manner sensitive to its significant characteristics;
 - vigorously prosecuting trespassers and vandals;
 - conducting public education;
 - conducting company education;
 - providing ground-protecting vegetation;

- implementing bank stabilization;
 - conducting recovery of archaeological data, including analysis and dissemination of results, in a manner consistent with the Secretary of the Interior's *Standards and Guidelines for Archaeological Documentation* (48 FR 44734-37) and the ACHP's handbook *Treatment of Archaeological Properties*; and
 - recording historical structures in a manner consistent with the Secretary of the Interior's *Standards and Guidelines for Architectural and Engineering Documentation* (48 FR 44730-34), and where applicable, for archaeological documentation.
- E. **Curation.** The HPMP shall discuss the curation and disposition of recovered archaeological materials. The Corps will ensure that curation of all archaeological materials and data from project lands attempts to conform to the Secretary's Standards and Guidelines, 36 CFR Part 79, and the requirements of the Archaeological Resources Protection Act (PL 96-95). Management of the archaeological materials and data will be consistent with applicable state law, as negotiated with DW.
- F. **Native American Consultation.** Native American concerns and consultation procedures shall be outlined in the HPMP.
- G. **Unanticipated Discoveries.** Treatment of unanticipated discoveries encountered during construction and operation shall be described in the monitoring plan.
- H. **Emergency Undertakings.** The HPMP shall outline the steps that shall be taken, during and after emergencies that pose serious threats to life and property, to consider the effects of emergency actions on historic properties. These steps shall include procedures for consultation between the Corps, SWRCB, the SHPO, and the ACHP.

Attachment 3. Data Recovery Plan Contents (Draft Outline)

DRPs shall be consistent with the Secretary of the Interior's *Standards and Guidelines for Archaeological Documentation* (48 FR 44734-37) and take into account the ACHP's publication *Treatment of Archaeological Properties* (Advisory Council on Historic Preservation 1980); contemporary professional standards; and the Department of the Interior's *Format Standards for Final Reports of Data Recovery Programs* (42 FR 53377-79). Consistent with the HPMP, the DRPs will specify, at a minimum:

- the property(ies) where data recovery is to be conducted;
- the values attached to the property(ies), including the research questions to be addressed through data recovery with an explanation of their relevance and importance;
- the methods to be used with an explanation of their relevance and relationship to the research questions;
- the cultural materials and methods to be used in data analysis, management, and dissemination;
- proposed costs for data recovery, data analysis, and report preparation;
- a proposed schedule for the implementation and completion of fieldwork, data analysis, and report preparation;
- a plan that describes how the final report will be made available to the professional archaeological community and the public;
- an outline for the final report;
- Native American consultation efforts; and
- a plan for the disposition and curation of cultural materials.